

EXHIBIT 7

Reed, Larry

September 26, 2007

Baltimore, MD

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UNITED STATES DISTRICT COURT
OF THE DISTRICT OF MASSACHUSETTS

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IN RE: PHARMACEUTICAL : MDL NO. 1456
INDUSTRY AVERAGE WHOLESALE : CIVIL ACTION
PRICE LITIGATION : 01-CV-12257-PBS
THIS DOCUMENT RELATES TO :
U.S. ex rel. Ven-A-Care of : Judge Patti B.
The Florida Keys, Inc., : Saris
Plaintiff, :
vs. :
ABBOTT LABORATORIES, INC., : Chief Magistrate
No. 06-CV-11337-PBS : Judge Marianne B.
Defendants. : Bowler

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VOLUME I

Baltimore, Maryland

Wednesday, September 26, 2007

Videotape Deposition of:

LARRY REED,

the witness, was called for examination by counsel
for the Defendants, pursuant to notice, commencing

Henderson Legal Services
202-220-4158

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<p>1 Q. And do you know how it was that you</p> <p>2 came to work on the Medicaid Drug Rebate</p> <p>3 legislation?</p> <p>4 A. I believe because I had worked on the</p> <p>5 Medicare Catastrophic Coverage Act and had some</p> <p>6 experience with legislation on prescription</p> <p>7 drugs.</p> <p>8 Q. Were you recruited to this position?</p> <p>9 A. I was working in that -- again, I was</p> <p>10 working on the Medicaid side of the house, again,</p> <p>11 HCFA at that point, and I was asked to work on</p> <p>12 that. I'm not sure by "recruited" what -- if you</p> <p>13 mean anything more than that?</p> <p>14 Q. That's good enough.</p> <p>15 A. Okay.</p> <p>16 Q. Now, the Medicaid rebate legislation --</p> <p>17 drug rebate legislation was passed in 1990; is</p> <p>18 that right?</p> <p>19 A. November of 1990, as I remember.</p> <p>20 Q. Okay. And so you would have been</p> <p>21 working in this position sometime before that?</p> <p>22 A. Beginning in the summer of 1990.</p>	<p>1 Non-Institutional -- can you give me</p> <p>2 the rest of it again?</p> <p>3 A. Payment Policy --</p> <p>4 Q. Payment Policy?</p> <p>5 A. -- Branch.</p> <p>6 Q. And when we say "non-institutional,"</p> <p>7 we're talking about non-hospital?</p> <p>8 A. Correct, non-hospital, and I don't</p> <p>9 recall -- I don't believe we worked on nursing</p> <p>10 facility issues either, non-institutional issues.</p> <p>11 Q. After the Medicaid Drug Rebate</p> <p>12 legislation was passed and you were no longer</p> <p>13 advising on legislation, what did you do then?</p> <p>14 A. At that point, our job was to implement</p> <p>15 the law.</p> <p>16 Q. And you were the -- where did you fit</p> <p>17 in in terms of implementing that law? Were you</p> <p>18 the head of the division in charge of doing it,</p> <p>19 second in command, third in command? Where were</p> <p>20 you?</p> <p>21 A. I was the branch chief for the branch</p> <p>22 that had that area of responsibility. Above the</p>
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<p>1 Q. What was your -- do you recall what</p> <p>2 your title was in that position?</p> <p>3 A. For the first part of that position, I</p> <p>4 was still a branch chief for the claims</p> <p>5 processing branch.</p> <p>6 Q. I think you said that for the first</p> <p>7 part of this assignment, you were still the</p> <p>8 branch chief of a processing policy division?</p> <p>9 A. That's correct.</p> <p>10 Q. Did that change?</p> <p>11 A. That did change.</p> <p>12 Q. And what was your next position?</p> <p>13 A. The next position was as the branch</p> <p>14 chief of the Medicaid Non-Institutional Payment</p> <p>15 Policy Branch.</p> <p>16 Q. That's a mouthful. Branch chief of the</p> <p>17 Medicaid Non-Institutional -- I'm going to write</p> <p>18 this down.</p> <p>19 A. Okay.</p> <p>20 Q. Give me one second --</p> <p>21 A. Sure.</p> <p>22 Q. -- because I won't remember it.</p>	<p>1 branch would be a division, and above the</p> <p>2 division would be an office. Above the office</p> <p>3 would be a bureau, and on from there.</p> <p>4 Q. Okay. Who did you report to in your</p> <p>5 position as the branch chief of the Medicaid Non-</p> <p>6 Institutional Payment Policy Branch?</p> <p>7 A. Bill Hickman was the office director.</p> <p>8 There was a division director, Bernie Trueffer,</p> <p>9 in between.</p> <p>10 Q. And how was Mr. Trueffer's name</p> <p>11 spelled?</p> <p>12 A. Trueffer, T-R-U-E-F-F-E-R, I believe.</p> <p>13 I might have the E and the U mixed around.</p> <p>14 Q. What is Mr. Hickman doing today, do you</p> <p>15 know?</p> <p>16 A. Bill Hickman is retired.</p> <p>17 Q. Do you know when he retired, roughly?</p> <p>18 A. A number of years ago. I don't</p> <p>19 remember exactly the year he retired.</p> <p>20 Q. More than 10 years ago?</p> <p>21 A. Again, probably in the area of 5 or 10</p> <p>22 years. I don't -- I don't recall any more</p>

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<p style="text-align: right;">Page 58</p> <p>1 specifically than that.</p> <p>2 Q. Did you have anyone who reported to you</p> <p>3 who was involved in implementing the Medicaid</p> <p>4 Drug Rebate legislation?</p> <p>5 A. Yes.</p> <p>6 Q. Who is that?</p> <p>7 A. Several analysts that did work on the</p> <p>8 program.</p> <p>9 Q. Do you recall the names?</p> <p>10 A. I do.</p> <p>11 Q. Would you state them for me?</p> <p>12 A. Sure. I'm giving myself some time to</p> <p>13 try to recall them, not to be difficult.</p> <p>14 Q. Okay.</p> <p>15 A. Estelle Chisholm, Mike Keogh, Pete</p> <p>16 Rodler. Those were the initial analysts, as I</p> <p>17 recall.</p> <p>18 Q. Did individuals take their place at</p> <p>19 some point?</p> <p>20 A. There are a number of analysts that</p> <p>21 have worked in the program since that time.</p> <p>22 Q. Who was particularly involved in the</p>	<p style="text-align: right;">Page 60</p> <p>1 the issue of what state Medicaid programs were</p> <p>2 paying for drugs.</p> <p>3 A. And let me correct -- if I can, go back</p> <p>4 and add one other name to the initial list of</p> <p>5 individuals. Sue Gaston.</p> <p>6 And, I'm sorry, I thought about that</p> <p>7 and didn't listen to your question.</p> <p>8 Q. Okay. In looking at the documents that</p> <p>9 were produced in this case, your name's on quite</p> <p>10 a few documents, and it appears, looking at the</p> <p>11 documents, that, at some point, you became</p> <p>12 involved with the issue of what state Medicaid</p> <p>13 programs were paying for drugs.</p> <p>14 A. That's correct.</p> <p>15 Q. And when did that issue come within</p> <p>16 your realm of responsibility?</p> <p>17 A. Because that was a non-institutional</p> <p>18 payment policy issue, it would have been</p> <p>19 approximately the same time as I took over the</p> <p>20 branch chief for that branch.</p> <p>21 Q. So 1990?</p> <p>22 A. Approximately that, right.</p>
<p style="text-align: right;">Page 59</p> <p>1 Medicaid Drug Rebate implementation that you</p> <p>2 recall?</p> <p>3 A. In the initial implementation of the</p> <p>4 program?</p> <p>5 Q. No, just as time went on.</p> <p>6 A. Up until the current time?</p> <p>7 Q. Yes.</p> <p>8 A. Okay.</p> <p>9 Q. Give me your top five names.</p> <p>10 A. At this point --</p> <p>11 Q. Throughout that time period.</p> <p>12 A. Throughout that time period? The</p> <p>13 division director now is Deirdre Duzor; lead</p> <p>14 analyst, Kim Howell; Marge Watchorn.</p> <p>15 There may be others, but I -- there's</p> <p>16 other analysts that have come more recently or</p> <p>17 had us -- a different part of implementing the</p> <p>18 program maybe not to the same extent as some of</p> <p>19 those individuals.</p> <p>20 Q. Now, I've seen in the documents that</p> <p>21 have your name on them that have been produced</p> <p>22 that, at some point, you also got involved with</p>	<p style="text-align: right;">Page 61</p> <p>1 Q. Were there individuals -- we talked</p> <p>2 earlier about individuals who were particularly</p> <p>3 involved in implementing the Medicaid Drug Rebate</p> <p>4 Program. Similar question with respect to what</p> <p>5 state Medicaid programs reimburse for drugs.</p> <p>6 Do you recall particular individuals</p> <p>7 under your direction who were involved in that</p> <p>8 issue?</p> <p>9 MS. MARTINEZ: Objection to form.</p> <p>10 THE WITNESS: There were individuals</p> <p>11 that worked both on state plans and rebate</p> <p>12 programs. There -- really at that point for the</p> <p>13 analyst work, there wasn't a distinction.</p> <p>14 BY MR. TORBORG:</p> <p>15 Q. The same individuals who worked in the</p> <p>16 Medicaid Drug Rebate implementation also worked</p> <p>17 on the issue of what state Medicaid programs were</p> <p>18 paying for drugs; fair to say?</p> <p>19 A. Some might have worked a little bit</p> <p>20 more in one or the other, but generally that's</p> <p>21 correct.</p> <p>22 Q. In -- how long did you serve as the</p>

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<p>1 branch chief of the Medicaid Non-Institutional 2 Payment Policy Branch? How long did you have 3 that position? 4 A. Approximately until we moved into our 5 new headquarters, and that was in the mid '90s, 6 around 1995, our new headquarter building. 7 Q. And what position did you take at that 8 point? 9 A. There was a reorganization, and at that 10 point, the groups were -- I'm sorry, the -- they 11 were -- I'm trying to think of the right name, 12 teams, divisions, whatever they were called, were 13 reorganized and I became a technical director in 14 one of those areas. 15 Q. Which area was that? 16 A. It was generally the same area. It did 17 pick up some added functions. I don't remember - 18 - I don't recall the actual official name of that 19 area. 20 Q. But it was the division that was 21 charged with both implementing the drug rebate 22 legislation and what -- and overseeing what</p>	<p>1 side any longer. She doesn't work on the policy 2 side. 3 Q. There's an operational side and a 4 policy side? 5 A. That's correct. 6 Q. And the issue of what state Medicaid 7 programs should be paying for drugs was a policy 8 issue, right? 9 A. That issue of state plan amendments or 10 state payment for drugs was a policy issue, 11 that's correct. 12 Q. Did Ms. Pelter work in the Baltimore 13 office? 14 A. She did. 15 Q. Okay. Is she still there today? 16 A. She is. 17 Q. Is Ms. Gaston still there today? 18 A. She is -- also on the operations side, 19 she is. 20 Q. What are they doing on the operational 21 side? 22 A. Cindy works on general operational</p>
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<p>1 states were paying for drugs? 2 A. At that point, the legislation -- it 3 was 1995, so the legislation was fairly well 4 along in being implemented. It was for the 5 ongoing operational policy issues as well as 6 state plan amendments for paying for drugs. 7 Q. When did Mr. Rodler retire? 8 A. I don't remember -- I don't recall Pete 9 moving to the new building, so it was likely 10 before 1995. That's my recollection. 11 Q. When did Sue Gaston start? 12 A. Sue Gaston started fairly early on with 13 the -- after the law was passed. 14 Q. Another name I've seen in some of the 15 documents is a -- I gather it's a woman -- Cindy 16 Pelter? 17 A. Cindy Pelter. 18 Q. What was her job? 19 A. Cindy was an analyst that worked on -- 20 again, on state plan amendments and the Drug 21 Rebate Program. She works on the operations side 22 of the program now. She doesn't work for our</p>	<p>1 issues, Sue Gaston -- Sue works on a dispute 2 resolution program. 3 Q. Does the dispute resolution program 4 have anything to do with drugs? 5 A. It does. 6 Q. Okay. Does it deal with the Medicaid 7 Drug Rebate law? 8 A. That's correct. 9 Q. Anything else? 10 A. Do you want me to describe the program 11 further? 12 Q. Yes. 13 A. Okay. The dispute resolution program 14 basically brings manufacturers and states 15 together where -- where there's not agreement on 16 how much rebate should be paid by that 17 manufacturer to the state, there's a question of 18 units, of some other question where they're not 19 in agreement. 20 Q. What involvement does CMS have in that 21 program? You said I think that it would bring 22 the manufacturers together with the states.</p>

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<p style="text-align: right;">Page 74</p> <p>1 include the impact of discounts and rebates; is 2 that fair to say? 3 MS. MARTINEZ: Objection to form. 4 THE WITNESS: The rebate definition 5 does I believe have a -- have language in it that 6 addresses that issue. 7 BY MR. TORBORG: 8 Q. I've heard something -- I've seen 9 something in the documents to something called 10 the Medicaid Bureau? 11 A. Correct. 12 Q. What is that? 13 A. The Medicaid Bureau was a precursor, 14 predecessor of -- in the agency that had 15 responsibility for the Medicaid issues. 16 Q. And did that entity change its name at 17 some point? 18 A. At some point it did. It changed its 19 name to the Centers for -- the Center for 20 Medicaid & State Operations. 21 Q. And you worked within that 22 organization, correct?</p>	<p style="text-align: right;">Page 76</p> <p>1 management responsibilities, and a technical 2 director, which has technical and expert 3 responsibilities, if you will. 4 Q. And you took this position in 1995. 5 How long did you have that job? 6 A. Technical director -- there's been 7 various permutations since that time of being a 8 technical director or a division director, and at 9 this point, I am a technical director. 10 Q. Even today? 11 A. Again, with different -- different, if 12 you will, stops in between. 13 Q. What stops in between are there? 14 A. A technical director, and for a while I 15 served as the director -- the deputy director of 16 the division, I had responsibility for this area, 17 and, for a short while, as a director. 18 Q. When you say "this area," do we mean 19 drug reimbursement? 20 A. Among other areas, correct. 21 Q. What other areas? 22 A. Hospital reimbursement, upper payment</p>
<p style="text-align: right;">Page 75</p> <p>1 A. Which one? 2 Q. Both the Medicaid Bureau and the Center 3 for Medicaid & State Operations? 4 A. Correct. 5 Q. I want to go back -- I sort of got off 6 track. I wanted to go back to tracing through. 7 I believe you said in 1995 you took a 8 different position in connection with the 9 reorganization of HCFA, correct? 10 A. Correct. 11 Q. Was your job basically the same even 12 though the reorganization had shifted your title 13 and perhaps the division you worked in? 14 A. It was a bit different. A technical 15 director has non-management responsibilities, and 16 there were other areas in the new -- new group -- 17 I'm sorry, I can't -- just can't remember the 18 name of that group -- that I also worked on. 19 Q. What do you mean by "non-management 20 responsibilities"? 21 A. There's two tracks basically. There's 22 a division director, which has personnel and</p>	<p style="text-align: right;">Page 77</p> <p>1 limits. 2 Q. Upper payment limits, is that something 3 that relates to drugs? 4 A. Upper payment limits does relate to 5 drugs and it does relate to other services within 6 the Medicaid program. 7 Q. Okay. And when did you have that 8 position? 9 A. Which one? 10 Q. The deputy director position. 11 A. Deputy director was early -- the early 12 2000s. Around 2002, it was a team -- a team that 13 reported to the head of CMSO, with two team 14 leaders that was separated out of that group. 15 Q. Is that something called the pharm 16 team? 17 A. Correct. It was called the pharmacy 18 team at that point? Yes, it was. 19 Q. When did the pharm -- the pharmacy team 20 start? 21 A. The pharmacy team was -- started around 22 mid 2002.</p>

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<p style="text-align: right;">Page 298</p> <p>1 Q. Okay. And was that possibility of 2 using the AMP data in deciding whether or not to 3 approve state plans something that HCFA 4 considered? 5 MS. MARTINEZ: Objection. To the 6 extent that that question would go to internal 7 deliberations about whether or not to use it, 8 you're instructed not to answer. 9 MR. TORBORG: Why don't we take our 10 last break for the day and come back and finish 11 up. 12 THE VIDEOGRAPHER: Going off the 13 record. The time is 16:05:39. 14 (A break was taken.) 15 THE VIDEOGRAPHER: Going back on the 16 record. The time is 16:21:37. 17 BY MR. TORBORG: 18 Q. Welcome back, Mr. Reed. 19 A. Thank you. 20 Q. I'd like to finish off this discussion 21 with AMP with some hopefully unobjectionable 22 questions.</p>	<p style="text-align: right;">Page 300</p> <p>1 Q. Okay. And did you have access to that 2 information yourself, the AMP information? 3 A. I had access to it, meaning I could 4 look at it if I wanted to, but I didn't have 5 access to it in the sense that I would normally 6 look at it. 7 Q. Okay. Who all had access to the AMP 8 information within CMS, within HCFA? 9 A. The people that maintain the system 10 would have access to it, and the program people 11 would have access as well. 12 It wasn't protected information within 13 HCFA when used for that purpose. 14 Q. And unlike AWP, which was a list price, 15 AMP was not a list price; fair to say? 16 MS. MARTINEZ: Objection to form. 17 THE WITNESS: They're just completely 18 different terms. AMP is just AMP. You can't -- 19 there is nothing to compare it to, I mean, within 20 that context of the rebate program. There isn't 21 a list AMP and an AMP, if that's your question. 22 BY MR. TORBORG:</p>
<p style="text-align: right;">Page 299</p> <p>1 First, you started -- CMS started 2 receiving this AMP information from manufacturers 3 roughly in 1991; is that correct? 4 A. Starting with the first part of 1991. 5 Q. Okay. And where did that information 6 go in CMS? 7 A. Information was housed in electronic 8 storage. There were some other hard copy 9 documents, signed rebate agreements and the like, 10 which are maintained in hard files. 11 Q. Okay. And do you know if Abbott was 12 one of the manufacturers who participated in the 13 Medicare Drug Rebate Program? 14 A. In the Medicaid Drug Rebate Program? 15 Q. Yes. 16 A. Back at that point? 17 Q. Yes. 18 A. Offhand, I don't know, no. 19 Q. Do you know if they eventually did 20 become a member of that program? 21 A. I don't know specifically. Most 22 manufacturers are participating in the program.</p>	<p style="text-align: right;">Page 301</p> <p>1 Q. Do you know if there are differences 2 between average wholesale prices as published in 3 the compendia and AMP? Are there differences 4 between those two prices? 5 A. Are there differences between those two 6 prices? 7 Q. Yes. 8 A. Yes. 9 Q. What are those differences? 10 A. In definition, in -- 11 Q. Yes. 12 A. -- in monetary terms? 13 Q. In definition. 14 A. In definitions, for AWP, again, we 15 don't have a statutory definition in the Medicaid 16 program or a regulatory definition for AWP. 17 For AMP, we do have a -- we did have a 18 statutory definition, we do now have a regulatory 19 definition. In the meantime, for AMP, we also 20 had a National Drug Rebate definition. 21 Q. And do you know if there are certain 22 things that are included in the AMP calculation</p>

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<p style="text-align: right;">Page 310</p> <p>1 attorney, but go ahead. You guys want to take a 2 break, you're entitled to do that. 3 MR. MERKL: Well, again, for the 4 record, I object to the witness leading while 5 there's a question pending. The nature of the 6 question as counsel just indicated is the names 7 of counsel, and that is obviously not privileged, 8 so there's no basis to have the witness leave 9 while that question is pending. 10 MR. DRAYCOTT: Sure. This all goes to 11 privileged information, privileged 12 communications, and the question goes to what -- 13 as it expressly implicates the privilege, the, 14 you know, discussions with counsel. We'll see -- 15 MR. TORBORG: Why don't you go outside 16 and have your discussion. 17 MR. DRAYCOTT: I think that's what 18 we'll do. 19 MR. TORBORG: I object to you doing it 20 as well, but, you know, you're going to get up 21 and leave anyway, so no reason to argue about it. 22 THE VIDEOGRAPHER: Are we going off the</p>	<p style="text-align: right;">Page 312</p> <p>1 answer if he were to on a number of points, both 2 ones that were visited or touched upon earlier in 3 the deposition. 4 It would be helpful for me at this time 5 to hear the outstanding question. 6 MR. TORBORG: What I'm going to do is 7 ask a couple questions, have you object, have you 8 tell me what grounds you're objecting upon, and 9 we'll go from there. How's that? 10 First question, Mr. Reed, for you is 11 this: Did you have discussions within HCFA about 12 whether or not AMP data could be shared with the 13 states? 14 MR. DRAYCOTT: You can answer that 15 question -- if you can answer that question yes 16 or no, you may answer it. 17 THE WITNESS: Going back to the start 18 of the program discussing having AMP shared with 19 the states, we did have those discussions. 20 BY MR. TORBORG: 21 Q. Okay. Can you tell me about those 22 discussions?</p>
<p style="text-align: right;">Page 311</p> <p>1 record or staying on? 2 MR. TORBORG: Let's go off the record 3 until they come back. 4 THE VIDEOGRAPHER: Going off the 5 record. The time is 16:32:34. 6 (A break was taken.) 7 THE VIDEOGRAPHER: Going back on the 8 record. The time is 16:48:04. 9 MR. TORBORG: Okay. As we stopped, I 10 think I had a question pending, and there was an 11 instruction not to answer, and counsel for the 12 United States and the witness stepped out of the 13 room and wanted to talk about some issues 14 relating to an attorney-client privilege issue. 15 Justin, it looks like you want to make 16 some comments before we get -- 17 MR. DRAYCOTT: We talked to him about 18 both attorney-client and deliberative process. I 19 think we are convinced after that conferral that 20 the witness's concerns were well-founded and that 21 there are privileged communications that he was 22 legitimately concerned would be revealed in his</p>	<p style="text-align: right;">Page 313</p> <p>1 MR. DRAYCOTT: And you can't -- you may 2 -- you're instructed not to answer to the extent 3 that those discussions were deliberations that 4 ended up with the adoption of a policy on that 5 issue. 6 THE WITNESS: Okay. Could you repeat 7 the question? 8 BY MR. TORBORG: 9 Q. Tell me about the discussions you had 10 within HCFA about whether or not AMP data could 11 be shared with the states. 12 A. Those discussions led us to conclude 13 that it was better to share unit rebate amounts 14 with the states. 15 Q. And why did you conclude that? 16 MR. DRAYCOTT: And you may answer that 17 question except to the extent it will reveal 18 either the content of the deliberations or 19 communications with agency counsel. 20 So you can only -- can you answer that 21 question without revealing either of those? 22 THE WITNESS: No.</p>

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UNITED STATES DISTRICT COURT
OF THE DISTRICT OF MASSACHUSETTS

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IN RE: PHARMACEUTICAL : MDL NO. 1456
INDUSTRY AVERAGE WHOLESALE : CIVIL ACTION
PRICE LITIGATION : 01-CV-12257-PBS
THIS DOCUMENT RELATES TO :
U.S. ex rel. Ven-A-Care of : Judge Patti B.
The Florida Keys, Inc., : Saris
Plaintiff, :
vs. :
ABBOTT LABORATORIES, INC., : Chief Magistrate
No. 06-CV-11337-PBS : Judge Marianne B.
Defendants. : Bowler

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VOLUME II

Baltimore, Maryland

Thursday, September 27, 2007

Continued Videotape Deposition of:

LARRY REED,

the witness, was called for examination by counsel
for the Defendants, pursuant to notice, commencing

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<p style="text-align: right;">Page 418</p> <p>1 Q. If I could ask you to go to the comment 2 on the next page. It's a March 12, 1991 3 memorandum from Kevin Moley to Richard Kusserow, 4 Inspector General. 5 Do you know Kevin Moley? 6 A. I don't know him personally. I've 7 heard the name. 8 Q. In this comment, Mr. Moley stated, "We 9 recommend that the OIG reconsider the proposal in 10 this report in light of the actions taken by 11 Congress in OBRA '90. Section 4401 of that Act 12 prohibits the secretary from changing the formula 13 used in determining reimbursement rates for 14 outpatient drugs until after December 31, 1994. 15 Congress took this action in order to 16 allow adequate time to evaluate the impact of the 17 rebate provisions also enacted in OBRA '90. It 18 is extremely doubtful, therefore, that Congress 19 would be receptive to a recommendation for 20 immediate repeal of this provision, especially 21 considering the relatively small savings that 22 could be expected."</p>	<p style="text-align: right;">Page 420</p> <p>1 THE WITNESS: My understanding was that 2 the reimbursements that state had -- that states 3 had in their state plans would be frozen for a 4 period of time for those states that had a 5 discounted AWP or a discounted payment rate. 6 BY MR. TORBORG: 7 Q. Do you recall discussions within HCFA 8 about the fact that Congress did not want 9 pharmacies to be making less money in treating 10 Medicaid patients until December 31, 1994? 11 MS. MARTINEZ: Objection, form, and 12 also objection to the extent that it asks for 13 internal deliberations. 14 You can answer to the extent that 15 you're not revealing any internal deliberations 16 that lead to a decision. 17 THE WITNESS: Okay. So I can answer 18 yes, that there were discussions? 19 MS. MARTINEZ: If it didn't lead to a 20 decision, yes. 21 MR. TORBORG: I think from now on, 22 Annie, I'd like you to just say objection,</p>
<p style="text-align: right;">Page 419</p> <p>1 Do you recall, Mr. Reed, that overnight 2 the OBRA legislation passed in 1990 placed a 3 moratorium on decreases in pharmacy 4 reimbursement? 5 MR. HERNANDEZ: Objection, form. 6 THE WITNESS: I do recall that there 7 was a provision in the original OBRA '90 law that 8 did have a moratorium on certain pharmacy 9 payments. 10 BY MR. TORBORG: 11 Q. What do you recall about that? 12 A. I think I've pretty much told you what 13 I recall at this point. That's all I recall 14 about that part of it. 15 Q. Was your impression within HCFA and the 16 division that was responsible -- or the branch 17 that was responsible for Medicaid reimbursement 18 of drugs, was your understanding of the 19 moratorium was that Congress did not want 20 pharmacies to get paid less until December 31, 21 1994? 22 MS. MARTINEZ: Objection, form.</p>	<p style="text-align: right;">Page 421</p> <p>1 deliberative process privilege. I think he's 2 been given enough direction on how to deal with 3 this issue. 4 I think there's a question pending. 5 MS. MARTINEZ: I think he answered it. 6 BY MR. TORBORG: 7 Q. What was the answer? 8 MS. MARTINEZ: Yes. 9 BY MR. TORBORG: 10 Q. You do recall discussions about that? 11 A. About this provision? 12 Q. Can you tell me about those 13 discussions? 14 MS. MARTINEZ: Objection to the extent 15 that you're asking for privileged communications. 16 THE WITNESS: No. 17 MR. TORBORG: We need to take a break 18 for a tape change and also take a break. 19 THE VIDEOGRAPHER: This marks the end 20 of Tape 1 in the deposition of Volume II of Larry 21 Reed. 22 Going off the record. The time is</p>

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<p style="text-align: right;">Page 486</p> <p>1 of the statement, that that is what they 2 recommended to the state agency. 3 BY MR. TORBORG: 4 Q. What is your understanding? 5 A. That, again, what the language says, 6 that they recommend this as a factor in future 7 changes to pharmacy reimbursement. 8 Q. You don't have any further 9 understanding of what these results would be used 10 for? Would it be to increase the discount off of 11 AWP or something else? 12 A. It would be to -- it would likely be to 13 look at their Medicaid -- let me make sure I have 14 this right -- to look at their Medicaid 15 prescription drug program. 16 Q. In what way? To decrease 17 reimbursement? 18 MS. MARTINEZ: Objection, form. 19 THE WITNESS: I'm looking to see what 20 their current -- or their then reimbursement was. 21 It does look like they should consider again 22 changing the reimbursement.</p>	<p style="text-align: right;">Page 488</p> <p>1 THE WITNESS: From the paragraph that 2 you read me, or that part of it, it does appear 3 that that was the OIG's understanding of HCFA's 4 intention. 5 BY MR. TORBORG: 6 Q. Let me ask you to flip to the next 7 page, Bates page ending 552, second sentence 8 under the section "Scope." 9 OIG wrote, "Our review was limited to 10 ingredient acquisition costs and do not address 11 other areas such as the effect of Medicaid 12 business as a contribution to other store sales." 13 I'd like to stop there. 14 Do you recall that being an issue that 15 was discussed at HCFA, the contribution of -- to 16 other store sales of Medicaid business? 17 MS. MARTINEZ: Objection, form. 18 THE WITNESS: I believe this may have 19 been an issue that we addressed in the notice of 20 proposed rulemaking for the Deficit Reduction 21 Act. 22 BY MR. TORBORG:</p>
<p style="text-align: right;">Page 487</p> <p>1 BY MR. TORBORG: 2 Q. Change in what way? 3 A. It isn't further specified here. 4 Q. If I could ask you to go to the Bates 5 page ending in 551 of this report, last paragraph 6 states, "In November 1990, the Omnibus Budget 7 Reconciliation Act of 1990 was passed, which 8 placed a 4-year moratorium on changes to states' 9 reimbursement policies. The moratorium expired 10 on December 31, 1994, and HCFA requested that we, 11 once again, determine the difference between AWP 12 and actual pharmacy acquisition cost." 13 Does that refresh your recollection at 14 all, Mr. Reed, about the purpose of these 15 studies? 16 A. No, it doesn't refresh my recollection. 17 I don't have a recollection of this. 18 Q. Do you believe it's a fair inference 19 for me to make that the impetus of this study was 20 the exploration of the moratorium? 21 MR. HERNANDEZ: Objection, form. 22 MS. MARTINEZ: Objection, form.</p>	<p style="text-align: right;">Page 489</p> <p>1 Q. How so? 2 A. I think it was looking for a discussion 3 of -- if I remember correctly, it was a 4 discussion of Medicaid pricing versus what that 5 pharmacy might earn in other store sales. 6 Q. HCFA was looking for comments from the 7 industry on that; is that right? 8 A. That's correct, not only industry, but 9 from any commenter. 10 Q. And do you recall the results you 11 received on that question? 12 A. No, not offhand, I don't. 13 Q. Do you recall that topic being 14 discussed prior to HCFA's looking for comments in 15 that in connection with the DRA of 2005? 16 MS. MARTINEZ: Objection, privilege. 17 You're instructed not to answer, to the extent 18 that there were discussions leading up to the 19 issuance of that proposed rule. 20 BY MR. TORBORG: 21 Q. Have you had any other discussions, 22 apart from the Deficit Reduction Act of 2005 or</p>

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<p style="text-align: right;">Page 490</p> <p>1 the deliberations that went into that, about the</p> <p>2 issue of how Medicaid's business as a</p> <p>3 contribution to other store sales should impact</p> <p>4 Medicaid reimbursement for drugs?</p> <p>5 A. Not that I recall.</p> <p>6 Q. You don't recall having discussions</p> <p>7 with states in connection with the approval</p> <p>8 process of that issue?</p> <p>9 A. I don't recall that.</p> <p>10 Q. You have an understanding of, generally</p> <p>11 speaking, what that issue involves, right?</p> <p>12 A. This issue --</p> <p>13 Q. Yes.</p> <p>14 A. -- the effect of Medicaid business as a</p> <p>15 contribution to other store sales?</p> <p>16 Again, as I've stated, our NPRM</p> <p>17 addressed that, that that and this statement is</p> <p>18 my understanding.</p> <p>19 Q. Let me try to see if I can state my</p> <p>20 understanding and see if you'll agree with it.</p> <p>21 Was it the case that pharmacies have</p> <p>22 claimed that they don't make as much money on</p>	<p style="text-align: right;">Page 492</p> <p>1 says other areas they do not address included</p> <p>2 "the cost to provide professional services other</p> <p>3 than a -- other than dispensing a prescription,</p> <p>4 such as therapeutic interventions, patient</p> <p>5 education and physician consultation."</p> <p>6 Do you have an understanding of what</p> <p>7 those things are about?</p> <p>8 A. I think I have a general understanding</p> <p>9 of those -- of that topic.</p> <p>10 Q. And what is your general understanding</p> <p>11 of that topic?</p> <p>12 A. From this, the part of the sentence</p> <p>13 that you read me, that they looked only at the</p> <p>14 dispensing -- the cost of dispensing a</p> <p>15 prescription and did not look at these other</p> <p>16 services.</p> <p>17 Q. And do you recall discussions in your</p> <p>18 current HCFA about the cost of pharmacies to</p> <p>19 provide professional services other than</p> <p>20 dispensing prescriptions, such as therapeutic</p> <p>21 intervention, patient education and physician</p> <p>22 consultation?</p>
<p style="text-align: right;">Page 491</p> <p>1 other store sales from Medicaid businesses</p> <p>2 because of the indigent nature of the Medicaid</p> <p>3 patients?</p> <p>4 MS. MARTINEZ: Objection, form.</p> <p>5 MR. HERNANDEZ: Objection, form.</p> <p>6 BY MR. TORBORG:</p> <p>7 Q. Isn't that something that pharmacies</p> <p>8 have raised with you at HCFA?</p> <p>9 A. Could you clarify a little bit?</p> <p>10 Q. I don't know whether I can.</p> <p>11 A. Okay. Have they stated what again?</p> <p>12 Q. That they don't make as much money in</p> <p>13 other store sales, so non-drug sales, from</p> <p>14 Medicaid patients as they do from other patients.</p> <p>15 Has that been an issue that's been</p> <p>16 raised?</p> <p>17 MS. MARTINEZ: Objection, form.</p> <p>18 THE WITNESS: In the broader sense, has</p> <p>19 it been an issue raised in the Medicaid program?</p> <p>20 It may have been raised.</p> <p>21 BY MR. TORBORG:</p> <p>22 Q. And then this sentence also -- OIG also</p>	<p style="text-align: right;">Page 493</p> <p>1 Do you recall discussions about that?</p> <p>2 A. Yes.</p> <p>3 Q. Can you tell me about those</p> <p>4 discussions?</p> <p>5 MS. MARTINEZ: Objection, privileged.</p> <p>6 To the extent that those discussions were done in</p> <p>7 anticipation of a decision or a proposed</p> <p>8 rulemaking or another decision at HCFA, you're</p> <p>9 instructed not to answer. Otherwise, you can</p> <p>10 answer.</p> <p>11 THE WITNESS: I can't answer.</p> <p>12 BY MR. TORBORG:</p> <p>13 Q. Because of the privilege issue?</p> <p>14 A. Correct.</p> <p>15 Q. Okay. What policy does that -- do</p> <p>16 those deliberations relate to?</p> <p>17 A. There are policies -- and I don't</p> <p>18 remember the format that they're in -- on other</p> <p>19 services. It goes -- they go by different names,</p> <p>20 but other services that pharmacists provide that</p> <p>21 would be reimbursed separate from ingredient cost</p> <p>22 and dispensing fee.</p>

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<p style="text-align: right;">Page 494</p> <p>1 Q. Okay. So HCFA had discussions about a 2 policy on that issue; is that fair to say? 3 A. Yes. 4 Q. Because of the instruction of counsel, 5 I'm not going to be allowed to learn about those 6 through questioning of you; is that right? 7 A. Correct. 8 Q. Another thing that OIG states is "the 9 cost of dispensing, which includes costs for 10 computers, multipart labels, containers, 11 technical staff, transaction fees, Medicaid- 12 specific administrative costs, and general 13 overhead." 14 Did you have discussion about those 15 issues in your career at HCFA? 16 A. Not that I recall. 17 Q. The discussions that you had relating 18 to that second category that we talked about, 19 professional services -- that category, correct? 20 A. Correct. 21 Q. -- did those have any impact on HCFA's 22 policies for reimbursement of drugs?</p>	<p style="text-align: right;">Page 496</p> <p>1 of money state Medicaid programs would be 2 permitted to reimburse for ingredient cost or 3 dispensing fees? 4 A. Not as I recall, no. 5 Q. Do you recall either way? 6 A. I recall that they likely did not have 7 an impact on ingredient cost or dispensing fee. 8 Q. So they were considered -- so they were 9 costs that you considered, but after you 10 considered them, didn't worry about whether or 11 not to pay for them at all; is that right? 12 A. No. 13 MS. MARTINEZ: Objection, form. 14 MR. TORBORG: Okay. Well, let me 15 strike that and try again. 16 Did HCFA provide or did the states 17 provide a separate payment for professional 18 services other than dispensing of prescription, 19 such as therapeutic interventions, patient 20 education and physical (sic) consultation? 21 THE WITNESS: Some states -- under our 22 policy instructions, states could provide for</p>
<p style="text-align: right;">Page 495</p> <p>1 MS. MARTINEZ: Objection, form. 2 THE WITNESS: And I think I need 3 further clarification. Of which policies, for 4 prescription drugs? 5 BY MR. TORBORG: 6 Q. I don't know what specific policies it 7 would result in, but I'm trying to figure out if 8 there's a connection between the discussions that 9 you had relating to the cost to provide 10 professional services other than dispensing, what 11 impact, if any, those discussions had on the 12 actual amount that state Medicaid programs 13 reimbursed for drugs and/or what HCFA approved on 14 that topic. 15 MS. MARTINEZ: Objection, form. 16 THE WITNESS: The cost for other 17 services are -- is a separate cost determination 18 from the ingredient cost and from -- from the 19 cost of dispensing a prescription. 20 BY MR. TORBORG: 21 Q. And my question was did those 22 discussions have any impact at all on the amount</p>	<p style="text-align: right;">Page 497</p> <p>1 that payment. Which states did provide for that 2 payment, I don't know. 3 BY MR. TORBORG: 4 Q. I'd ask you to go to the response from 5 the state of California. It's Bates page 562. 6 It's a letter from John Rodriguez dated March 7 25th, 1996. 8 Now, this is dated before the final -- 9 before the date of the final report; is that 10 right? 11 A. This -- I'm sorry, is this dated before 12 the letter to the state; is that your question? 13 Q. Is it dated before the date of the 14 report? 15 A. Yes. 16 Q. Was it your understanding that the 17 states would be given draft copies of the 18 reports, of these particular reports in this 19 1995-1996 nationwide survey? 20 A. The letter indicates that the state did 21 receive the results of the audit contained in 22 that draft report.</p>

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<p style="text-align: right;">Page 518</p> <p>1 Q. Also I'd like to ask you to go to Bates 2 page ending 667, "Conclusions and 3 Recommendations," for this report. 4 The first paragraph states, "Based on 5 our review, we have determined that there is a 6 significant difference between AWP and pharmacy 7 acquisition costs. The difference between AWP 8 and pharmacy acquisition costs is significantly 9 greater for generic drugs than for brand name 10 drugs." 11 Do you recall becoming aware of that 12 comment in OIG's report? 13 A. Of this specific comment in this 14 specific report? 15 Q. Just the general notion, I guess, a 16 broader notion that OIG had found in its work 17 that there was a significantly greater difference 18 in the spread, if you will, between AWP and 19 acquisition costs for generic drugs. 20 MS. MARTINEZ: Objection, form. 21 THE WITNESS: That there is a 22 difference between the AWP discount for a brand</p>	<p style="text-align: right;">Page 520</p> <p>1 MS. MARTINEZ: No, the discussions were 2 within HCFA, and if they related to an 3 anticipated decision by HCFA, then it would be 4 privileged and then you would be instructed not 5 to answer. 6 If you had a discussion with somebody 7 in the outside that's not related to a policy 8 decision like that, you can -- you can answer. 9 THE WITNESS: I can't answer. 10 BY MR. TORBORG: 11 Q. So you had discussions within HCFA 12 about the significantly greater difference 13 between acquisition costs and AWP for generic 14 drugs as compared to branded drugs, correct? 15 MS. MARTINEZ: Objection, form. 16 THE WITNESS: We did have those 17 discussions. 18 BY MR. TORBORG: 19 Q. And I'm not permitted to probe your 20 memory here today because you've been instructed 21 not to answer, correct? 22 A. Correct.</p>
<p style="text-align: right;">Page 519</p> <p>1 and generic drug, yes. 2 BY MR. TORBORG: 3 Q. You recall having those -- you recall 4 observing that in the reports or having 5 discussions with HCFA, or what do you recall 6 about that subject? 7 A. Observing the report, observing that in 8 the reports. 9 Q. Did you have discussions about the 10 significantly greater difference between AWP and 11 acquisition costs for generic drugs as opposed to 12 branded drugs? 13 MS. MARTINEZ: Objection, form. 14 MS. POLLACK: Objection, form. 15 THE WITNESS: I believe we had those 16 discussions. 17 BY MR. TORBORG: 18 Q. Who were those discussions with? 19 MS. MARTINEZ: Objection, privilege. 20 MR. TORBORG: We have to decide who the 21 discussions were with before we can decide what 22 privilege applies.</p>	<p style="text-align: right;">Page 521</p> <p>1 Q. And did your discussions have any 2 impact on the amount at which HCFA approved state 3 Medicaid plans for payment of drugs? 4 A. I'm not sure I understand your 5 question. 6 Q. Okay. Let me see if I understand. 7 We agree we had -- you had discussions 8 within HCFA about the significantly greater 9 difference between acquisition costs and AWP for 10 generic drugs. 11 MS. MARTINEZ: Objection, form. 12 BY MR. TORBORG: 13 Q. You had those discussions, right? 14 MS. MARTINEZ: Objection, form. 15 THE WITNESS: There were discussions. 16 BY MR. TORBORG: 17 Q. And in your office, you are responsible 18 for determining whether or not to approve or 19 disapprove state Medicaid plans in the -- at 20 least in the area of prescription drug 21 reimbursement, correct? 22 A. No, that's not correct.</p>

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<p>1 Q. This regional offices -- the regional 2 offices had that responsibility? 3 A. It was a shared responsibility. 4 Q. Okay. And if I understand the basis 5 for the insertion of privilege and your 6 observation of the privilege is that those 7 discussions related to some sort of policy, 8 correct? 9 MR. HERNANDEZ: Objection to form. 10 MS. MARTINEZ: Decision -- decision by 11 HCFA. 12 BY MR. TORBORG: 13 Q. A decision or a policy, correct? 14 A. A decision or a policy, correct. 15 Q. Okay. What decision or policy was 16 that? 17 MS. MARTINEZ: Objection, form. 18 THE WITNESS: And, I'm sorry, I'm not 19 sure what you're looking -- what you're -- 20 BY MR. TORBORG: 21 Q. The deliberative process privilege is 22 supposed to apply to deliberations leading to a</p>	<p>1 Let me ask you, after you've had a 2 chance to review those two pages, whether you 3 recall this response from the state of Montana. 4 THE WITNESS: I don't recall this 5 response. 6 BY MR. TORBORG: 7 Q. In the first paragraph, Montana's Peter 8 Blouke -- I'm sure I'm not pronouncing that right 9 -- indicated that, "Montana currently pays the 10 lesser of AWP minus 10 percent, federal upper 11 limit for multisource generic products. In 12 addition to the product cost, Medicaid also 13 reimburses a dispensing fee not to exceed \$4.08 14 per script," then it continues. 15 And that's consistent, is it not, with 16 the NPC report that I marked as Exhibit Abbott 17 326, the 1996 page? 18 MS. MARTINEZ: Sorry, are you -- is it 19 Exhibit Abbott 327? 20 MR. TORBORG: Exhibit Abbott 326 is the 21 NPC reports. 22 MS. MARTINEZ: Oh, right, right.</p>
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<p>1 decision or a policy. 2 A. Right. 3 Q. I'm trying to decide -- trying to 4 figure out what decision or policy those 5 discussions related to. 6 A. The decision would be how to look at 7 this and reviewing a state plan. 8 Q. And whether or not to approve or 9 disapprove the plan? 10 A. That could be part of that decision. 11 Q. Which would ultimately determine how 12 much providers were paid for drugs, correct? 13 A. Correct. 14 Q. I'd like to ask you to go to the last 15 page of the document -- second to last page and 16 the last page, which are the letter response from 17 the state of Minnesota to OIG's report. 18 MS. MARTINEZ: Montana? 19 MR. TORBORG: Come again? 20 MS. MARTINEZ: Montana? 21 MR. TORBORG: Montana report, yes, 22 Bates 673, 674.</p>	<p>1 THE WITNESS: The NPC 1996 report 2 references AWP minus 10. It doesn't reference a 3 federal upper limit price. 4 BY MR. TORBORG: 5 Q. Okay. The federal upper limit price 6 was a -- was that a mandatory price? 7 MR. HERNANDEZ: Objection, form. 8 MS. MARTINEZ: Objection, form. 9 MR. TORBORG: Actually, strike that. 10 That's probably not a very good way to ask that 11 question. It doesn't matter. 12 And the NPC report also showed a 13 dispensing fee of between \$2 and \$4.08, correct, 14 which is consistent with the Montana letter? 15 MR. HERNANDEZ: Objection, form. 16 THE WITNESS: You're referring to the 17 NPC 1996? I put it away, so I had to go back to 18 it. 19 BY MR. TORBORG: 20 Q. Yes. 21 A. The dispensing fee is listed for 22 Montana as \$2 to 4.08.</p>

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<p style="text-align: right;">Page 526</p> <p>1 Q. Which is consistent with the letter, 2 correct? 3 A. The letter indicates a dispensing fee 4 not to exceed 4.08. 5 Q. So it's consistent, correct? 6 A. I can't -- 7 MR. HERNANDEZ: Objection, form. 8 THE WITNESS: I can't -- they're 9 different statements. 10 BY MR. TORBORG: 11 Q. Okay. This first paragraph also notes, 12 "Montana's corresponding average discounts as 13 computed by the OIG are 16.23 percent and 48.46 14 percent respectively." 15 Correct? 16 A. Correct. 17 Q. And then they note they currently are 18 reimbursing the lesser of AWP minus 10 percent or 19 the federal upper limit, correct? 20 A. Montana currently pays the lesser of 21 AWP minus 10 percent -- that statement is 22 correct.</p>	<p style="text-align: right;">Page 528</p> <p>1 BY MR. TORBORG: 2 Q. For these specific reports, did you 3 find OIG's work to be reliable? 4 MS. MARTINEZ: Objection, form. 5 THE WITNESS: I think these reports are 6 directed more at the states, so I don't know that 7 we needed to look at the reliability. These were 8 directed at what the -- what the amounts were in 9 individual states. 10 MR. TORBORG: We have to do a tape 11 change. 12 THE VIDEOGRAPHER: This marks the end 13 of Tape 3 of Volume II of the deposition of Larry 14 Reed. 15 Going off the record. The time is 16 14:13:50. 17 (A break was taken.) 18 THE VIDEOGRAPHER: This marks the 19 beginning of Tape 4 of Volume II of the 20 deposition of Larry Reed. 21 Going back on the record. The time is 22 14:44:16.</p>
<p style="text-align: right;">Page 527</p> <p>1 Q. And so there's quite a bit of 2 difference between OIG's findings and Montana -- 3 Montana's reimbursement methodology at that time, 4 correct? 5 MS. MARTINEZ: Objection, form. 6 THE WITNESS: And clarify your question 7 again. Are you referring to the set of drugs 8 that the OIG looked at? 9 BY MR. TORBORG: 10 Q. I'm just comparing the Montana drug 11 reimbursement methodology for ingredient cost 12 with OIG's findings. They're inconsistent, are 13 they not? 14 MS. MARTINEZ: Objection, form. 15 THE WITNESS: Again, this is a sample 16 that the OIG did, and I don't know. 17 BY MR. TORBORG: 18 Q. Did you find OIG's work to be reliable 19 in your work? 20 MS. MARTINEZ: Objection, form. 21 THE WITNESS: In some cases, we relied 22 on it; in other cases, we did not.</p>	<p style="text-align: right;">Page 529</p> <p>1 BY MR. TORBORG: 2 Q. Welcome back, Mr. Reed. 3 A. Thank you. 4 Q. I want to revisit some testimony we had 5 during the last session. 6 You indicated there were some 7 discussions within HCFA about the differences -- 8 the greater difference in AWP acquisition cost 9 for generic drugs versus branded drugs, correct? 10 MS. MARTINEZ: Objection to form. 11 THE WITNESS: That there was HCFA 12 discussion of that? Yes. 13 BY MR. TORBORG: 14 Q. And I asked you about those 15 discussions, counsel asserted the deliberative 16 process privilege. I then asked you what policy 17 or decision that those discussions related to, 18 and your answer was the decision would be how to 19 look at this in reviewing the state plans, and I 20 asked whether or not to approve or disapprove the 21 plans, and you answered that could be part of the 22 decision.</p>

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<p style="text-align: right;">Page 530</p> <p>1 My follow-up question for you, Mr. 2 Reed, was what was HCFA's decision or policy? 3 What was the final decision or policy that HCFA 4 reached? 5 MS. MARTINEZ: Objection to form. 6 THE WITNESS: The decision that -- and 7 I'm not sure, HCFA may too broad of a term here, 8 all of HCFA, but the decision was whether or not 9 to revise regulations for looking at these types 10 of ingredient costs or whether to issue policy 11 instructions for that, and we didn't do -- we did 12 not do either. 13 BY MR. TORBORG: 14 Q. So the decision was not to revise the 15 ingredient cost regulations for -- what was the 16 second? 17 A. A policy guidance document. 18 Q. And what was the rationale for that 19 decision? 20 MR. DRAYCOTT: You can answer, but only 21 limit it to the decision itself. You should not 22 answer to the -- with respect to -- to the extent</p>	<p style="text-align: right;">Page 532</p> <p>1 operate their program and to what extent we 2 intercede in -- in directly making them make 3 changes to the program versus overseeing their 4 program through the state plan process. 5 BY MR. TORBORG: 6 Q. And what about that structure led to 7 your decision not to revise regulations or issue 8 any other policy guidance? 9 A. That there is a structure -- there is a 10 structure in place, again, of how we relate to 11 state Medicaid agencies. There are parts of the 12 prescription drug program where we direct the 13 states how to pay for drugs, or a maximum in 14 aggregate to pay for drugs. There are other 15 parts where the states make their determination 16 of prescription drug payment policies -- of 17 prescription drug payment methodologies. 18 Q. Any other further rationale you can 19 provide? 20 A. No, not at this point. 21 (Deposition Exhibit Abbott 328 was 22 marked for identification.)</p>
<p style="text-align: right;">Page 531</p> <p>1 the answer would reveal the deliberations that 2 resulted in that final decision. 3 MR. TORBORG: I just want to argue with 4 counsel a little bit here before you answer, and 5 that is, the deliberative process privilege does 6 not apply to prevent us from understanding the 7 rationale for the decision. 8 We, I think, all agree on that, and if 9 we don't agree, we can go get some case law, and 10 I think we'll come to a quick agreement. 11 So I am allowed to know what the 12 rationale for the decision was. 13 MR. DRAYCOTT: And he was so instructed 14 just now. 15 MR. TORBORG: Okay. 16 MR. DRAYCOTT: You may state the 17 rationale, but you have to be careful in just 18 stating the rationale that resulted from the 19 deliberations, not the deliberations themselves. 20 THE WITNESS: Okay. The rationale 21 basically is that there's a structure between CMS 22 and the state Medicaid programs on how they</p>	<p style="text-align: right;">Page 533</p> <p>1 BY MR. TORBORG: 2 Q. For the record, Mr. Reed, what I've 3 marked as Exhibit Abbott 328 bears Bates numbers 4 HHC004-0188 through 90. I'd like you to take a 5 look at that document to the extent necessary to 6 tell me whether you recall it. 7 And I'll note, Mr. Reed, that given the 8 file -- some information that counsel has given 9 us about where different documents came from, I 10 have some reason to believe that this document 11 may have come from your files. I don't know for 12 sure, but I have some reason to believe it may 13 have come from your files. 14 Also for the record, this document is 15 titled "Review of Medicaid Drug State Plan 16 Amendments." It's not dated, and there are no 17 particular names on the document. 18 While Mr. Reed's doing that, let me ask 19 counsel for the United States, previous 20 discussions about trying to get a file source 21 index for documents, the government did state if 22 there were particular documents for which we'd</p>

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<p>1 Amendments."</p> <p>2 Q. So does it not provide some insight</p> <p>3 into HCFA's thinking on whether it should approve</p> <p>4 state plan amendments?</p> <p>5 MR. DRAYCOTT: Objection.</p> <p>6 THE WITNESS: It provides -- answer?</p> <p>7 MR. DRAYCOTT: Well, you can -- again,</p> <p>8 without going into revealing the deliberations,</p> <p>9 the options that were considered, you can state</p> <p>10 what the purpose of the document is.</p> <p>11 THE WITNESS: The purpose of the</p> <p>12 document was to look at ways of how would we</p> <p>13 react to state -- submitted state plan</p> <p>14 amendments.</p> <p>15 BY MR. TORBORG:</p> <p>16 Q. Particularly in the context of the</p> <p>17 OIG's work identifying larger differences in --</p> <p>18 larger differences between average wholesale</p> <p>19 price and average acquisition cost than as</p> <p>20 specified in the state plan amendments, correct?</p> <p>21 A. The OIG reports were a factor in that.</p> <p>22 MR. GORTNER: Eric Gortner for Roxane.</p>	<p>1 amendments that did not provide a reimbursement</p> <p>2 methodology consistent with OIG's findings?</p> <p>3 A. The decision making authority for any</p> <p>4 state plan amendment rests with the Director of</p> <p>5 the Medicaid Bureau -- I'm not going to say that,</p> <p>6 because, at that point, it rests for some time --</p> <p>7 for some time period with the regions and for</p> <p>8 some time period with the Director of the Centers</p> <p>9 for Medicaid & State Operations within CMS.</p> <p>10 Q. When was the -- when did that shift in</p> <p>11 responsibility occur?</p> <p>12 A. The shift occurred I believe in the</p> <p>13 early summer, late spring of 2002.</p> <p>14 Q. What caused that change in</p> <p>15 responsibility?</p> <p>16 A. I think there were some concerns that</p> <p>17 there may be differing interpretations in the</p> <p>18 regions to state plan amendments in this area.</p> <p>19 Q. Are those concerns that you had?</p> <p>20 MR. DRAYCOTT: Objection. To the</p> <p>21 extent -- you can answer, but only to the extent</p> <p>22 that you're not revealing your own participation</p>
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<p>1 I move to strike that answer as non-responsive.</p> <p>2 THE WITNESS: Can I have the question</p> <p>3 again?</p> <p>4 MR. TORBORG: I object to your motion</p> <p>5 to strike because I think he did answer the</p> <p>6 question that I asked, but let's ask it again.</p> <p>7 (The reporter read back the</p> <p>8 record.)</p> <p>9 MR. GORTNER: I stand on my objection.</p> <p>10 BY MR. TORBORG:</p> <p>11 Q. Whose decision was it, Mr. Reed, on</p> <p>12 whether or not to approve or disapprove state</p> <p>13 plan amendments that did not call for a</p> <p>14 reimbursement methodology consistent with OIG's</p> <p>15 findings?</p> <p>16 MR. DRAYCOTT: Objection. You can</p> <p>17 answer if you can.</p> <p>18 THE WITNESS: I can't because I don't</p> <p>19 understand your question. Whose decision was it</p> <p>20 to do what?</p> <p>21 BY MR. TORBORG:</p> <p>22 Q. To approve or disapprove state plan</p>	<p>1 in the deliberations that yielded the final</p> <p>2 policy decision about where authority would</p> <p>3 finally reside.</p> <p>4 THE WITNESS: Then I can't answer.</p> <p>5 (A discussion was held off the</p> <p>6 record.)</p> <p>7 MR. TORBORG: Why would Mr. -- why</p> <p>8 would the fact of whether or not he participated</p> <p>9 in the deliberations be something that would be</p> <p>10 covered by the deliberative process privilege?</p> <p>11 MR. DRAYCOTT: I don't think it's the</p> <p>12 fact of his participation in the deliberations.</p> <p>13 It's -- I think you asked the question -- that</p> <p>14 wasn't the question you asked him is whether or</p> <p>15 not he participated in those deliberations. You</p> <p>16 asked him for his personal view, and if he has a</p> <p>17 personal view that exists outside of those</p> <p>18 deliberations, this goes to the core deliberative</p> <p>19 process.</p> <p>20 Deliberative process covers the</p> <p>21 exchange of opinions amongst agency officials who</p> <p>22 contribute to the final policy decision, so to</p>

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<p style="text-align: right;">Page 558</p> <p>1 the extent that you're asking for his personal 2 view and his personal view is one that was 3 offered during those deliberations, it's 4 privileged. 5 MR. TORBORG: The fact that his 6 personal view was shared with others is the 7 reason why it's privileged? 8 MR. DRAYCOTT: No. That's not your 9 question. Your question was what was his view, 10 and to the extent that he was, at the level that 11 he occupied within HCFA, a part of the 12 deliberations that resulted in the decision where 13 authority to disapprove or approve a state plan 14 resided, that's a deliberation that resulted in 15 that decision. 16 So he can answer except to the extent 17 that it reveals the content of the deliberations, 18 that is, the exchange of ideas amongst the people 19 who were responsible for formulating policy. 20 BY MR. TORBORG: 21 Q. Do you understand his instruction? 22 A. I believe I do.</p>	<p style="text-align: right;">Page 560</p> <p>1 of a different question, but now I've forgotten 2 what that is, too. 3 BY MR. TORBORG: 4 Q. Did you have concerns yourself about 5 whether or not there needed to be a change in who 6 was approving state plan amendments? 7 A. I can't answer that question. 8 Q. Because it would reveal internal 9 deliberations within HCFA? 10 A. That's correct. 11 Q. Your personal view? 12 A. My personal view, if it was part of -- 13 as I understand the instructions, if it was part 14 of the decision making process, yes. 15 Q. The fact that your personal views are 16 involved in the decision making process doesn't 17 automatically cover it -- make them covered by 18 the deliberative process privilege. 19 The deliberative process privilege 20 covers the exchange of ideas, not necessarily 21 your personal view. 22 MR. DRAYCOTT: Objection.</p>
<p style="text-align: right;">Page 559</p> <p>1 Q. Okay. He's directing you not to reveal 2 the exchange of information that occurred during 3 those deliberations. 4 I'm asking you for your personal view 5 of whether or not there needed to be a change in 6 who had the authority for approving or 7 disapproving state plan amendments. 8 MR. DRAYCOTT: Objection. You can -- 9 MR. TORBORG: You've already given him 10 the instruction. I think he answers it. No need 11 for coaching anymore. I think he can answer it. 12 THE WITNESS: Well, I -- 13 MR. DRAYCOTT: Objection. There's been 14 no coaching, Counsel. There's been clear 15 instructions about privilege. 16 MR. TORBORG: Yeah, more than enough, 17 so I think he's got it. 18 THE WITNESS: I think -- I think I 19 heard two questions. One was what was my 20 personal view on this, and in this regard, I 21 think -- I can't answer that question. 22 And then your second question was a bit</p>	<p style="text-align: right;">Page 561</p> <p>1 BY MR. TORBORG: 2 Q. With that clarification, can you answer 3 my question? 4 A. But as I understand it, if my personal 5 opinion were a part of the deliberative process 6 because I expressed that opinion in reaching that 7 decision, it would be covered. 8 Q. And that's your understanding of the 9 deliberative process privilege as conveyed to you 10 by counsel? 11 A. That's correct. 12 MR. TORBORG: And that's a view, Mr. 13 Draycott, that you share? You agree with his 14 understanding; is that right? 15 MR. DRAYCOTT: Counsel, if you have a 16 question that you'd like to direct to the 17 witness, you may. You've already told me that my 18 instruction to the witness was clear and that you 19 didn't want further elaboration, so the 20 instruction stands. 21 David, I mean, we've made our position 22 very clear and our position about this document</p>

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